FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 289

DAN S. MARTIN, JR.,

Petitioner,

vs.

ESTHER R. WAGNER, AS EXECUTRIX OF THE ESTATE OF ZOE R. MARTIN, DECEASED, JOHN D. MARTIN AND DAN S. MARTIN, SR.

PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

ERLE PETTUS,
Counsel for Petitioner.

JACKSON, RIVES & PETTUS,
Of Counsel.

INDEX

Subject Index

Table of Cases Cited

Statutes Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 289

DAN S. MARTIN, JR.,

Petitioner,

vs.

ESTHER R. WAGNER, AS EXECUTRIX OF THE ESTATE OF ZOE R. MARTIN, DECEASED, JOHN D. MARTIN AND DAN S. MARTIN, SR.

PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Petition for Certiorari

Your petitioner, Dan S. Martin, Jr. of Birmingham, Alabama, respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Alabama to review, revise and reverse that certain final judgment and decision of the Supreme Court of Alabama in the case of Dan S. Martin, Jr., appellant, versus Esther R. Wagner as Executrix of the Estate of Zoe R. Martin, deceased, et al., appellees, rendered on March 7,

1946, upon which the appellant's motion for rehearing in said cause in the Supreme Court of Alabama was by final judgment in that Court overruled and disallowed on the 11th day of April 1946. (Certified Transcript of Proceedings from the Supreme Court of Alabama is filed herewith.)

Summary Statement of the Matter Involved

On January 15, 1945, petitioner, Dan S. Martin, Jr. filed in the Probate Court of Jefferson County, Alabama, a court of competent jurisdiction, a petition to probate the lost will of his deceased uncle, W. C. Martin.

A lost will may be probated in whole or in part under Alabama law.

The petition averred that petitioner was then in the Armed Services of the United States; that W. C. Martin, a resident of Jefferson County, Alabama, departed this life in said county on the 18th day of July 1940, leaving a last will and testament duly signed and published by him and attested by two competent witnesses, then residents of the County, who subscribed their respective names to said will; and averring the name of one of said witnesses as Val J. Nesbitt, decedent's attorney; that the next of kin of the decedent at the time of his death were his widow, Zoe Rhode Martin; a brother, John D. Martin of Eufala, Alabama; and a brother Dan S. Martin, Sr. of Birmingham, Alabama, each over the age of 21 years; and petitioner was named as a legatee in said will; that the said will was a valid and subsisting will at the time of the death of the said W. C. Martin; and that the said will had been lost or destroyed after the death of the said W. C. Martin, testator.

The petition in the Probate Court further averred that W. C. Martin left no children, but left a widow whose name was Zoe Rhode Martin, who was deceased at the time his

petition was filed in the Probate Court for the probate of the lost will; and that Esther Wagner had been duly appointed and had qualified as Executrix of the estate of Zoe Rhode Martin, deceased.

The petition in the Probate Court further averred that said will was duly executed and had never been revoked by the testator; and set out and averred substantially the contents of the said lost will as follows:

> A. All of the real estate owned by the said decedent, consisting mainly of the old home place located in Clio, Barber County, Alabama, was devised equally to Dan S. Martin and John D. Martin, brothers of the testator;
>
> B. That all of the income from the stock and bonds and personal property owned by the said W. C. Martin or Will C. Martin at the time of his death was bequeathed to his wife, Zoe Rhode Martin; and that all of said stock and bonds and personal property at her death were bequeathed to your petitioner, Dan S. Martin, Jr. to the extent of a one-fourth interest therein; and to Sylvia Forbes, a niece of said Mrs. Zoe Rhode Martin, to the extent of a one-fourth interest; and to Katherine Isabel Martin, a niece of the decedent, to the extent of a one-fourth interest; and the remaining one-fourth interest to Zoe Rhode Martin, sister of petitioner; it being stipulated in substance that upon the death of the said Mrs. Zoe Rhode Martin, the widow, all of said stocks and bonds and all personal property owned by the said Will C. Martin at the time of his death were to be left in equal parts to your petitioner, Dan S. Martin, Jr., Sylvia Forbes, Katherine Isabel Martin and Zoe Rhode Martin, the latter a sister of petitioner.

The petition to probate the lost will of W. C. Martin, deceased, was signed Dan S. Martin, Jr., by his attorney.

Thereafter, there was filed in connection with said peti-

tion an affidavit from Dan S. Martin, Sr., the father of petitioner, to the effect that Dan S. Martin, Jr., the petitioner, was in the Armed Services of his country; that the facts averred in the petition were true according to the best of affiant's knowledge, information and belief and that Dan S. Martin, Sr. was the agent of Dan S. Martin, Jr., the petitioner.

The respondents Dan S. Martin and J. D. Martin accepted service of notice of filing petition to probate the lost will and waived further service.

Thereupon the Probate Court of Jefferson County, Alabama made and entered an order setting the said petition to probate the lost will for hearing on the 16th day of February 1945, and to hear testimony in proof of the lost will; and ordering that notice be given to John D. Martin and Dan S. Martin, Sr. and Esther Wagner as executrix of the estate of Zoe R. Martin, deceased.

On February 16, 1945, the matter was further continued by the Court until the 23rd day of February 1945; and thereupon the defendant, Esther R. Wagner as executrix of the estate of Zoe R. Martin, deceased, and Esther R. Wagner individually filed demurrers to the petition. The petitioner in the Probate Court, Dan S. Martin, Jr., then filed in the Probate Court in said cause the following paper:

STATE OF ALABAMA,
Jefferson County:

IN THE PROBATE COURT OF SAID COUNTY

No. —

In the Matter of the Estate of W. C. MARTIN, Deceased, Petition to Probate Lost Will. Dan S. Martin, Jr., Petitioner

Now comes petitioner, Dan S. Martin, Jr., in said cause, by his attorney, Erle Pettus, and hereby repre-

sents and shows unto this Honorable Court that he is in the Armed Services of his country; that he has a short time back returned from overseas duty; that he is now temporarily stationed in Washington, D. C., but that, due to his service in the Army, his ability to prosecute his said suit is and would be materially affected.

WHEREFORE, the premises considered, petitioner moves this Honorable Court that a further hearing of this cause be continued and held in abeyance until three months after the service of petitioner in the Armed Services is terminated; and petitioner hereby invokes the protection of the Soldiers and Sailors Civil Relief Act of the United States.

This the 23 day of February, 1945.

(S.) ERLE PETTUS,
As Attorney for Petitioner,
DAN S. MARTIN, JR.

An affidavit by Dan S. Martin, Jr., the petitioner, sworn to by him before a Notary Public, was filed in said cause to the effect that he was in the Armed Services of his country and unable to prosecute the cause; petitioner moved the court to continue the hearing of the cause and that same be held in abeyance until three months after service of the affiant, petitioner in said cause, in the Armed Service is terminated; and petitioner invoked the protection of the Soldiers and Sailors Civil Relief Act of the United States.

The Court, on February 23, 1945, made and entered an order sustaining the demurrers of defendant, Esther R. Wagner, individually and as executrix, to the petition to probate the said lost will and made an order allowing the petitioner 20 days within which to amend his petition.

An affidavit by Dan S. Martin, Sr., was duly filed averring that Dan S. Martin, Jr. petitioner, had entered the Armed

Service of his country in 1941 and had returned a few months prior to making this affidavit from overseas service and that he was temporarily stationed in Washington, D. C. and was on duty. This petitioner stated that it was his information and belief that petitioner's ability to prosecute the said suit was materially affected by the service of petitioner.

Petitioner thereupon amended his petition by adding an additional paragraph nine to said petition in words and figures as follows:

> 9. On information and belief affiant states that the said will was prepared by Val. J. Nesbit, decedent's attorney, and a copy of same was retained by said attorney among his papers; that the original was at one time with the personal papers of the decedent at his office at the Vulcan Rivet and Bolt Company; that the same was at one time removed to the box or vault of decedent at the bank; and that said will was in existence at the time of the death of the decedent. That the decedent before his death stated to your petitioner that the said will was in existence, duly executed and discussed the contents of the same with your petitioner.

And said amendment was duly verified by the petitioner and Dan S. Martin, Jr. himself before a Notary Public.

Thereupon the Probate Court noted the filing of the amended petition together with the motion for stay of the proceedings until the service of petitioner in the Army was terminated and the Court made an order passing the hearing on the amended petition until the 30th day of March 1945.

Thereupon the petitioner, Dan S. Martin, Jr., filed objection to a further proceeding in said cause as follows:

THE STATE OF ALABAMA,
Jefferson County:

IN THE PROBATE COURT OF SAID COUNTY

In Re: W. C. MARTIN, Dec'd. Petition of Dan S. Martin, Jr., to Probate Lost Will of Said Decedent

Now comes said Petitioner, Dan S. Martin, Jr., by his attorney, Erle Pettus, and hereby, after having filed his affidavit and motion for a continuance under "The Soldiers' and Sailors' Civil Relief Act of 1940, as amended in 1942 and 1944", of the U. S., hereby represents to this Honorable Court that he is incapable of properly prosecuting his said cause or suit, on account of his military service at this time; and said petitioner hereby objects to any further action in said cause; and represents to said Court that any further action or proceeding in said cause or proceedings will be highly prejudicial to petitioner's rights in the premises.

(S.) ERLE PETTUS,
As Atty. for Petitioner.

The objection of the petitioner having been overruled by the Court petitioner through his attorney filed the following statement averring that due to the absence of petitioner in the Armed Services of his country he was unable to further proceed with the prosecution of the cause, which said paper was as follows, namely:

THE STATE OF ALABAMA,
Jefferson County:

In Re: Estate of W. C. Martin, Dec'd. Petition of Dan S. Martin, Jr., to Probate Lost Will of Said Decedent

Now comes said petitioner by his atty. and after the Court, over his objection, has permitted the refiling of respondent's demurrers to the Petitioner's

amended Petition, as amended on March 14, 1945, and after the Court over Petitioner's objection has ruled upon same sustaining said demurrers; the Court thereupon called upon Petitioner's attorney in open court to state whether or not he desired to plead further, or whether or not Petitioner desired further time within which to amend or plead further, and Petitioner's said attorney answered in reply that because of the absence of petitioner in the armed service of his country, Petitioner was and is unable to amend or proceed further in said cause at this time.

(S.) ERLE PETTUS,
As Attorney for Petitioner.

Thereupon on March 30, 1945, the Probate Court made and entered the following order and final judgment in said Probate Court:

Case No. 12837

PROBATE COURT

March 30, 1945.

W. C. MARTIN, Deceased, Estate of, In Re: Petition as Amended, to Probate His Lost Last Will and Testament

This matter coming on to be heard upon the petition as amended, of Dan S. Martin, Jr., for the probate of the Lost Last Will and Testament of W. C. Martin, deceased, and also upon the motion of Dan S. Martin Jr., to continue the hearing of said cause until three months after the service of said movant in the army is terminated; which said petition and motion were heretofore filed in this Court and set for hearing on this date:

Upon consideration of the foregoing motion, the Court is of the opinion that same should be denied upon the grounds that movant has no interest in the matter alleged, by reason of the fact that nothing in the

record shows the existence or loss of any valid will. It is therefore, ORDERED, ADJUDGED and DECREED by the Court that said motion be and the same is hereby denied.

WHEREUPON, Erle Pettus, as Attorney for Dan S. Martin, Jr., filed objection to any further action or proceedings in said cause;

WHEREUPON, Esther R. Wagner, as Executrix of the Estate of Zoe R. Martin, Deceased, and Esther R. Wagner, Individually, by her attorneys, Lange, Simpson, Brantley & Robinson, and Smyer & Smyer, refiled demurrers to Petitioner's petition, as amended on March 14, 1945.

Upon consideration, it is the opinion that demurrers are well taken. It is therefore, ORDERED, ADJUDGED and DECREED by the Court that said demurrers be sustained the same are hereby sustained.

In open Court the petitioner, by his attorney, Erle Pettus, having declined to plead or proceed further in the case, it is therefore,

ORDERED, ADJUDGED and DECREED by the Court that said petition as amended be and the same is hereby disallowed and on motion of Esther R. Wagner as Executrix in open court, said petition is dismissed.

The petitioner in the Probate Court thereupon perfected his appeal to the Supreme Court of the State of Alabama from this final judgment in the Probate Court dismissing his petition, after having disallowed and overruled the soldier's application and request for a stay of the proceeding.

On November 27, 1945, the cause was submitted in the Supreme Court of Alabama; and on March 7, 1946, the Supreme Court of Alabama handed down its opinion and judgment affirming the judgment of the Probate Court of Jefferson County, Alabama, denying the soldier's right to a stay of the proceeding, and dismissing the soldier's

petition to probate the lost will of his deceased uncle.

Thereupon the appellant in the Supreme Court of Alabama, petitioner in the Probate Court, made his motion and application for rehearing of the judgment of the Supreme Court of Alabama rendered on the 7th day of March 1946, and filed his brief and argument in support of said motion for rehearing.

The record shows that appellant's petition for rehearing filed on the 21st day of March 1946, after being duly examined and considered by the Supreme Court of Alabama, was overruled and disallowed on the 11th day of April 1946.

The opinion of the Supreme Court of Alabama is set forth in full in the certified transcript herewith filed.

Application for rehearing in said cause in the Supreme Court of Alabama was denied and disallowed without opinion. This was a final judgment.

This Court Has Jurisdiction

A soldier in the Armed Service of his country has been denied his day in court guaranteed to him by the Federal Statute known as The Soldiers' and Sailors' Civil Relief Act. He has been denied and refused the right to prosecute his suit.

The Federal Statute relied upon is set out in Title 50 U. S. C. A. as Section 521 as follows:

> "521. Stay of Proceedings Where Military Service Affects Conduct Thereof
>
> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the Court in which it is pending, on its own motion, and shall, on application to it

by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. Oct. 17, 1940 c. 888 #201, 54 Stat. 1181. U. S. C. A. Title 50, App. 521, page 139 War Appendix."

Right Claimed under Statute of United States Denied

The Supreme Court of the State of Alabama effectually denied to your petitioner a right claimed under the Statute of the United States.

The State Court decided a Federal question of substance not theretofore fully determined by the Supreme Court of the United States.

The State Court decided the Federal question in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

The question of petitioner's right claimed under the Federal Statute was raised and fully presented; and his insistence that the proceedings in the Probate Court be continued or stayed on account of petitioner's services in the Armed Forces of his country was arbitrarily overruled and disallowed and his suit dismissed without petitioner ever having had an opportunity to present his case.

In its opinion the Supreme Court of Alabama stated the questions raised on appeal as:

(1) Whether petition to probate the alleged lost will of W. C. Martin, deceased, was subject to demurrer.

(2) Whether the Probate Court erred in refusing to stay the proceedings on account of the military service of the petitioner. As to the latter, the question was whether or not on application to the Court by the soldier or some

person in his behalf, the proceedings should be stayed as provided in the Act, unless, in the opinion of the Court, the ability of plaintiff to prosecute the action, or defendant to conduct his defense, *is not materially affected by reason of his military service.*

The record shows that in the Probate Court after the demurrers were sustained to the amended petition of the petitioner the Court called upon the petitioner's attorney in open Court to state whether or not he desired to plead further or whether or not he desired further time in which to amend or plead further; and the petitioner's attorney in reply stated that because of the absence of the petitioner in the Armed Services of his country petitioner was and is unable to amend or proceed further in said cause at this time.

Upon this, the Court made and entered the above judgment and decree declaring among other things that "in open Court the petitioner by his attorney, Erle Pettus, having declined to plead or proceed further in the case it is therefore

"ORDERED, ADJUDGED and DECREED by the Court that said petition as amended by and the same is hereby disallowed and on motion of Esther R. Wagner as Executrix in open court said petition is dismissed."

Upon this the Supreme Court in its opinion says "the case was never set for hearing on its merits. The Court did not pass upon the question as to whether or not the trial upon the merits would be stayed. The Court merely required, with the attorney in court, for the case to proceed to the point of having before the court a proper petition. But further pleading was declined."

The Question Presented

The question presented in this Honorable Court is whether or not a soldier while actually in the Armed Services of his country without dispute shall be entitled to the protection of the Federal Statute known as The Soldiers' and Sailors' Civil Relief Act so as to be permitted to have his day in court.

The term "Court" as used in the Soldiers' and Sailors' Civil Relief Act includes any court of competent jurisdiction of the United States, or any state, whether or not a court of record. Where no proceeding has already been commenced in court and the act requires an application to be made to a court, it may be made to any court.

Am. Vet. page 696, Section 880.

Reasons Relied on for Allowance of Writ

The Federal Question presented involves the construction, the application, and the effect of that section of the Soldiers' and Sailors' Civil Relief Act in reference to stay of proceedings where Military Service affects conduct thereof. By its terms the act is applicable to any action or proceeding in any court in which a person in military service is involved, either as plaintiff or as defendant, during the period of such service.

Title 50, U. S. C. A. App. Section 521, October 17, 1940, C. 888, Section 201, 54 Statute 1181.

This proceeding instituted in the Probate Court of Jefferson County, Alabama, a court of competent jurisdiction, by the petitioner Dan S. Martin, Jr., a soldier then in the Armed Service of his country, sought to probate a lost last will of his deceased uncle, W. C. Martin.

Under the Alabama law prior to the decision by the Supreme Court of Alabama in the instant case, although

the execution of a will is required to be attested by two witnesses, a lost will may be established by the testimony of a single witness.

When the contents of a lost will are not completely proved the probate may be granted as to the provisions which are proved. Proof of substance of a lost will is sufficient and the exact words need not be shown.

Skeggs v. *Horton,* 82 Ala. 352;
Allen v. *Scruggs et al.,* 190 Ala. 654;
Jordan v. *Ringstaff,* 212 Ala. 413.

No special form of pleading is prescribed or required under the Alabama law for the purpose of probating a will. An application for the probate of a will may be made verbally or in writing.

Small v. *McCalley,* 51 Ala. 527.

All that was required for the probate of a lost will under the Alabama law was to show its existence or that it was in existence, an instrument in writing properly executed; its loss or destruction in the event it was in existence at the time of testator's death, and the contents in substance and effect.

Potts v. *Coleman,* 86 Ala. 94;
Jacques v. *Horton,* 76 Ala. 238;
Price v. *Price,* 199 Ala. 433;
Washam v. *Beaty,* 210 Ala. 635.

The Supreme Court of Alabama in its opinion says the questions for decision in that appeal are:

(1) Whether the petition to probate the lost will of W. C. Martin, deceased, was subject to demurrer.

(2) Whether the court erred in refusing to stay the proceedings on account of the military service of petitioner.

The Supreme Court then held that the petition filed in the Court below was demurrable for having failed to aver the name of the other subscribing witness or give a valid excuse for not averring his name.

This constituted an innovation in the Alabama law as no statute up to the date of this Alabama Supreme Court decision required petitioner in propounding a lost or stolen will for probate to make the averment of the names of two subscribing witnesses.

In fact, Title 61, Section 39 of the Code of Alabama provides that where no contest is filed (to the probate of a will) the testimony of one attesting witness is sufficient. If the Supreme Court of Alabama could correctly hold upon the record before it in this case that the demurrer to the petition to probate the lost will of the decedent was properly sustained; and that the petitioner must amend his petition; he was required in effect to amend his pleadings in this instance by averring the name of the other subscribing witness to the will. To make such amendment, the presence of the petitioner would have been necessary. He should have been allowed the right, not only to be in court, but to have an opportunity to prepare his case for trial; to make an exhaustive search for the witness if necessary; or to account for his inability to produce the name of the witness; as well as to confer with his counsel, and make preparation for trial. The trial court sustained the demurrer and then over objection arbitrarily entered final judgment or decree disallowing the amended petition of petitioner, and on motion of Esther R. Wagner as Executrix dismissed the petition. This was an abuse of discretion by the trial court; an arbitrary act of the court in dismissing the petition without the absent soldier ever having had an opportunity to prepare or present his case; or to secure the necessary facts and evidence to amend his

petition as required by the trial court; or to present to the court the evidence to sustain his petition. The petitioner was denied and refused his day in court.

On January 18, 1945, in case *Ex Parte Jones,* 20 So. (2d), page 859, Justice Stakely of the Supreme Court of Alabama, who also wrote the opinion for the Court in the instant case, defined "abuse of discretion" by quoting approvingly from *Peyton* v. *State,* 244 Ala. 10, 13 So. (2d) 422; an opinion from the Chief Justice of the Alabama Supreme Court as follows:

> "And while it is not necessary, to constitute abuse, that the court shall act wickedly or with intentional unfairness, it is essential to show that it has committed a clear or palpable error, without the correction of which manifest injustice will be done. Since the court trying the cause is, from personal observation, familiar with all the attendant circumstances, and has the best opportunity of forming a correct opinion upon the case presented, the presumption will be in favor of its action, and in no case will the exercise of this discretion be reviewed where it manifestly appears that justice has been done without sacrificing the rights of defendant" (20 So. (2d) page 862).

That definition was written in regard to an ordinary continuance of a cause; but the facts here presented involved the rights of a soldier under the Federal Statute.

Under this Statute it has been held that the Court in denying a stay of proceeding should make a finding of the facts upon which it bases its opinion; and should conclude that the ability to defend is not materially affected by military service.

Esposito v. *Schille,* 40 A (2) 475, 135 Conn. 449.

This Federal Statute makes mandatory the staying of proceedings when application is made for one in military service *unless* in the opinion of the court the ability of de-

fendant to conduct his defense is not materially affected by reason of such service.

In re: Adoption of a minor, 136 Fed. (2d) 790, 78 U. S. App. D. C. 48.

The Act must be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation; and discretion vested in trial courts to that end is not to be withheld on mere speculations as to whether prejudice may result from absence resulting from service.

Boone v. *Lightner,* 63 Sup. Ct. 1223, 319 U. S. 561, 87 L. Ed. 1587.

One of the various purposes of the Act was to give the assurance that in the field of individual justice no advantage in judicial proceedings filed against a soldier or sailor would result from his absorption in his country's defense.

Am. Vet., page 690, Section 867;
Bowsman v. *Peterson,* 45 Fed. Supp. 741.

The application need not set forth facts which a party will swear and when he will be able to appear; nor need it be verified or sworn to.

Am. Vet., Sec. 900, page 712.

While the question of burden of proof upon such application as that made in the instant case has not been fully decided, it has been held that absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial.

Boone v. *Lightner,* 319 U. S. 561.

It has been said that the duty is imposed on the trial judge to inquire and find whether or not the ability to de-

fend the party seeking the stay is materially affected by reason of his military service.

Adoption of Minor, 78 U. S. App. D. C. 48, 136 Fed. (2) 790.

Doubtful cases should be resolved in favor of the service man.

Johnson v. *Johnson,* 59 Cal. App. (2) 375, 139 P. (2) 33.

In holding against the soldier in the instant case the Supreme Court of Alabama relies heavily upon the case of *Oliver* v. *Oliver,* 12 So. (2d) 852, 244 Ala. 234.

There the question was whether or not the complainant in a divorce suit who made the proper affidavit that the defendant was not a member of the Armed Services of the United States and that he was physically disabled for such service was sufficient compliance with the law. There was no evidence whatsoever in that case that the defendant was in the Armed Services and the question was not one of staying the proceedings.

The Supreme Court of Alabama also cites and apparently relies upon some excerpts of the opinion in the case of *Boone* v. *Lightner,* 63 Sup. Ct. 1223, 319 U. S. 561, 87 L. Ed. 1587. The facts in the *Boone* case bear no resemblance to the facts in the case at bar. There without dispute the defendant himself a lawyer had conducted a good portion of the trial; and was also represented by counsel; and a good portion of the evidence had been taken with the concurrence of the defendant. The defendant was there charged with misappropriation of trust funds.

The Court found in the *Boone* case that the defendant had ample time and opportunity to properly prepare his defense; that his military service had not prevented him from doing so, and held that the motion was not made in

good faith but that the defendant sought to invoke the protection of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrongdoing.

Here there is no charge against the petitioner of wrongdoing; he was a soldier without doubt and there is no question about his being in the Armed Services; and there was no evidence whatsoever to show that his substantial cause of action could be properly conducted and prosecuted in his absence without prejudice to his rights.

On a question of even an ordinary continuance it has been said:

> "Party to a cause in a measure directs or assists in the management of the case by suggestion and advice to his attorney during the progress of the cause, the striking of the jury, the order in which witnesses are examined, and questions to be propounded. By his familiarity with the facts of the case, the facts within his knowledge personally, he is of great assistance to his counsel, and a trial judge should exercise great caution in the exercise of his discretion in matters of continuance on account of the absence of a party to the suit.
>
> *Barnes* v. *Atlantic Coast Line R. R. Co.*, 96 S. E. 530, 110 S. C. 259. 17 C. J. S. p. 210."

The *Boone-Lightner* case, *supra,* presents an extreme situation; we have not found any decision of the Supreme Court of the United States fully construing and clarifying the Federal Statute in question as applicable to a case such as here presented. Numerous state and lower court decisions are not fully in accord as to the exact meaning and effect of the Soldiers' and Sailors' Civil Relief Act.

This case presents a clear-cut question as to whether or not the party to the litigation being at the time in the Armed Services of his Country shall upon application to the court in which such matter is pending be granted a stay; or whether the discretion of the trial court may be arbitrarily

exercised against the rights of the soldier. The act itself provides that the court may of its own motion stay the action; but whenever the party or some one in his behalf applies for the stay it must be granted, unless the court is of the opinion that the ability of the plaintiff to prosecute, or defendant to conduct his defense is not materially affected by his absence in military service. This proviso makes it discretionary with the court to grant or deny the stay, although this discretion may be less extensive where an application is made therefor than where it is granted upon the Court's own motion. It has been said that the Court's opinion must be based on some character of showing made to it and that in doubtful cases the stay should be granted.

Am Vet., page 708, Sec. 896, citing
Reynolds v. *Haulcroft*, 205 Ark. 760;
Burke v. *Hyde Corp.*, Tex. Civ. App. 173 S. W. (2d) 364;
Johnson v. *Johnson*, 59 Cal. App. (2d) 375, 139 Pac. (2d) 33.

The certiorari should be granted in this case and the cause reviewed to the end that in the field of individual justice no advantage in judicial proceeding by or against a soldier or sailor might here result; and also to the end that the Supreme Court of the United States may construe and declare the rights of the person in the Armed Services as granted in the Soldiers' and Sailors' Civil Relief Act.

Respectfully submitted,

ERLE PETTUS,
Counsel for Petitioner.

JACKSON, RIVES & PETTUS,
Counsel for Petitioner.